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No. 88-172

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANCIS SKAW, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek review of the court of appeals' decision affirming the determination by the Claims Court that petitioners failed to prove discovery of valuable mineral deposits on their unpatented mining claims.

1. Between 1953 and 1964, petitioners (Skaw) located 15 unpatented mining claims for gold and garnet along the banks of the St. Joe River on land administered by the United States Forest Service of the Department of Agriculture (Forest Service) (Pet. App. 23). In 1978, Congress designated the St. Joe River as a component of the Wild and Scenic Rivers System under Section 708(a)(23) of the National Parks and Recreation Act of 1978 (codified at 16 U.S.C. 1274 (a)(23)), and prohibited dredge mining in the

river's bed and banks.[1] On March 5, 1979, petitioners filed an action in the Claims Court alleging that their mining claims were valid as of the October 1968 date of withdrawal of these lands, and that the prohibition on mining in the bed and banks of the St. Joe River effected a taking of their property rights secured under the mining laws (Pet. App. 37). They sought $10 million as just compensation (*ibid.*).

2. The proceedings in this action were stayed to allow the Department of the Interior (Interior) to determine the validity of the mining claims (Pet. App. 37). On November 13, 1981, while the validity hearing was pending, the Idaho State Office of the Bureau of Land Management (BLM) declared the claims abandoned and void for failure to file evidence of annual assessment work or notice of intention to hold the claims as required by Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1744, and 43 C.F.R. 3833.1 and 3833.2 (Pet. App. 28). The Interior Board of Land Ap-

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[1] Section 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1280(a)(iii), provides that minerals in federal lands constituting the bed or banks of a river designated at that time or by subsequent amendment as part of the Wild and Scenic Rivers System, and in federal lands located within one-quarter mile of the banks of such a river, are withdrawn from "all forms of appropriation under the mining laws and from operation of the mineral leasing laws," except as those minerals are subject to valid existing rights. Section 9(b) of the Act, 16 U.S.C. (& Supp. IV) 1280(b), temporarily withdrew from appropriation under the mining laws minerals located within a quarter-mile of the banks of all rivers listed under Section 5(a) of the Act pending study for possible inclusion in the Wild and Scenic Rivers System.

The St. Joe River was listed by Section 5(a)(22), 16 U.S.C. 1276(a)(22), as a potential addition to the System. The subject lands remained in this status continuously up to 1978 when the segment of the St. Joe River at issue here was added to the System.

peals upheld the decision of the BLM and advised the United States Claims Court that Interior considered the claims to be abandoned and void (*id.* at 38). See *United States* v. *Skaw,* 63 I.B.L.A. 235 (1982).

3. The stay was lifted by the Claims Court on June 30, 1982, and the United States filed a motion for summary judgment (Pet. App. 38), which was granted (*id.* at 21). See *Skaw* v. *United States,* 2 Cl. Ct. 795 (1983). On petitioners' appeal, the court of appeals vacated the judgment and remanded the case for trial (Pet. App. 20). See *Skaw* v. *United States,* 740 F.2d 932, 938 (Fed. Cir. 1984). Following trial, the Claims Court found that "plaintiffs' evidence [did] not establish that a valid discovery had been made on any of the Ruby or Joe claims prior to the withdrawal on October 2, 1968" and "that plaintiffs had no property interests that could be the subject of an administrative or a legislative taking" (Pet. App. 109).

4. On April 19, 1988, the court of appeals affirmed. The court of appeals agreed with the Claims Court that "[petitioners'] evidence did not establish that a valid discovery of minerals had been made on any of [petitioners'] claims" (Pet. App. 111-112). The appeals court added that "[petitioners] have failed to show that the Claims Court's findings of fact, which are essential to the court's decision, are clearly erroneous" (*id.* at 112).

5. This case presents a fact-bound issue that was correctly decided by the Claims Court in a determination upheld by the court of appeals. The court of appeals' decision affirming the Claims Court's application of the "prudent man" test for discovery of a valid claim does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

a. In order to establish a valid property right potentially subject to a taking in violation of the Fifth Amend-

ment, petitioners were required to show that they had discovered a valuable mineral deposit within the boundaries of each properly located mining claim as of October 2, 1968. See *Cameron* v. *United States,* 252 U.S. 450, 456 (1920) (if a claim is not valid at the time of withdrawal, it is not excepted from the effect of the withdrawal).

A valuable mineral deposit has been discovered if the mineral found is of such quality and quantity that a person of ordinary prudence "would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." *Castle* v. *Womble,* 19 L.D. 455, 457 (1894). This is the "prudent man test" approved by this Court in *Chrisman* v. *Miller,* 197 U.S. 313, 322-323 (1905). The test has been refined to require a showing of marketability—*i.e.,* that the mineral can be presently extracted, removed, and marketed at a profit. *United States* v. *Coleman,* 390 U.S. 599, 602 (1968). A valuable mineral deposit has not been found, however, simply because the facts might warrant a search for such a deposit. See *ibid.*; see also *Barton* v. *Morton,* 498 F.2d 288, 290 (9th Cir.), cert. denied, 419 U.S. 1021 (1974).

In a contest with the government concerning the validity of a mining claim, the government bears only the burden of going forward with prima facie evidence of invalidity. The ultimate burden is on the claimant seeking the benefits of the mining laws to establish the discovery of a valuable mining claim by a preponderance of the evidence. See *Foster* v. *Seaton,* 271 F.2d 836, 837-838 (D.C. Cir. 1959); *United States* v. *Springer,* 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); *United States* v. *Taylor,* 19 I.B.L.A. 9 (1975).

b. Contrary to petitioners' assertion (Pet. 11), the trial court did not misapply the prudent man test in deter-

mining that petitioners' mining claims were never supported by a discovery of a valuable mineral deposit.

The Claims Court painstakingly reviewed the pre-withdrawal information submitted by petitioners based on evidence gathered prior to October 2, 1968. The court found that the estimates based on these explorations were either incredible or supported by insufficient information (Pet. App. 84-86) and concluded that further development of the mines on the basis of this pre-withdrawal information would be imprudent.[2] The Claims Court also exhaustively reviewed the results and economic analyses of extensive testing conducted by the government and petitioners after the date of withdrawal (*id.* at 63-78). Based on the pessimistic reports issued by the Interior Department (*id.* at 65-66) and the Forest Service (*id.* at 67-69, 74-78), cost estimates made by petitioners during that period (*id.* at 71-74), and an economic analysis made for hypothetical mines at petitioners' claim locations (*id.* at 77-78), the Claims Court justifiably concluded that the deposits could not be profitably mined (*id.* at 101).[3] The decision of the

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[2] The Claims Court stated (Pet. App. 86):

> It is clear that as of October 2, 1968, the work that had been done on the claims was not sufficient to establish that a discovery of valuable deposits had been made. Additional, extensive exploration was needed to determine if the deposits on any of the claims were such that it was economically feasible to operate a mine. Substantial amounts of additional testing was [*sic*] required before a determination could be made to develop the claims for commercial operations.

[3] The Claims Court also correctly viewed the failure to exploit or develop the mineral deposits during the period after location of the claims as "giv[ing] rise to a presumption that the market value of discovered minerals was not sufficient to justify the costs of extraction" (Pet. App. 92). See *United States v. Zweifel*, 508 F.2d 1150, 1156 n.5 (10th Cir.), cert. denied, 423 U.S. 829 (1975).

appeals court upholding this determination does not merit further review by this Court, which ordinarily does not disturb findings of fact concurred in by two lower courts. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985), and cases there cited.

Petitioners err in asserting (Pet. 10) that the Claims Court required petitioners to demonstrate profitability conclusively rather than to show a reasonable prospect of financial success. The Claims Court painstakingly explained why it found unpersuasive and unreliable the only evidence offered by petitioners to show that the claims might be profitable (Pet. App. 66-67, 71, 73, 86-91).[4]

[4] Contrary to their suggestion (Pet. 16), petitioners were not barred from developing sample data to support their claims. The record unambiguously shows that the government accommodated petitioners' efforts to obtain access to the claims (Pet. App. 94). Petitioners' allegations that they were prejudiced by the delay between the date of withdrawal and trial and by denial of access to retest their prior exposures (Pet. 16) is contrary to the evidence presented of testing conducted by petitioners in 1969, 1974, and 1975 (Pet. App. 56, 70, 72). In addition, the government made available to petitioners results of analysis of samples taken from a number of the claims sites (*id.* at 72).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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